No. 34636-6-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ARISTIDES GUEVARA,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Carrie Runge, Judge

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Court Rules

Other Resources

A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Guevara's right to a public trial.

2. The court imposed multiple convictions for the same offense without a finding of separate and distinct conduct, violating the double jeopardy protections of the Fifth Amendment and article I, section 9.

3. The court improperly imposed an exceptional sentence based on judicial fact-finding barred by the Sixth and Fourteenth Amendments and article I, section 22.

4. The trial court failed to enter written findings of fact and conclusions of law to support the exceptional sentence as required by the Sentencing Reform Act.

5. The court's boilerplate findings of fact and conclusions of law do not support the mandatory requirement of substantial and compelling reasons justifying the imposition of an exceptional sentence.

6. The court lacked authority to impose an exceptional sentence based on a jury's verdict that included uncharged allegations.

7. The court imposed conditions of community custody that are unauthorized by statute or case law.

8. The court imposed community custody conditions that are impermissibly vague and subject to arbitrary enforcement.

Issues Pertaining to Assignments of Error

1. The trial court considered evidentiary matters implicating constitutional rights at an inaudible sidebar. Did this courtroom closure violate Mr. Guevara's constitutional right to a public trial?

2. When the State charges identical offenses during the same period of time, separate punishments may not be imposed unless the jury unambiguously finds separate and distinct conduct. The jury was not instructed it needed to find separate and distinct acts. Do Mr. Guevara's multiple convictions for the same offense violate double jeopardy?

3. The court may not impose an exceptional sentence above the standard range based on judicial fact-finding. Do the factual issues necessary to conclude there are substantial and compelling reasons to impose an exceptional sentence require a jury determination?

4. By statute, case law, and court rule, the court must enter findings of facts and conclusions of law explaining the factual and legal basis of an exceptional sentence. The court's findings of fact do not identify the substantial and compelling reasons for imposing an exceptional sentence. Does the court's inadequate consideration of the required elements of an exceptional sentence require a new sentencing hearing?

5. When the State seeks an exceptional sentence, it must give fair notice to the accused of the aggravating circumstances. The State charged Mr. Guevara with several aggravating circumstances without limiting the jury's verdict to the charging periods for which it gave notice. Did the court lack authority to impose an exceptional sentence when the jury's verdict reflects conduct not in the charging document?

6. The court imposed community custody conditions that are unauthorized by statute, overbroad, impermissibly vague, or capable of arbitrary enforcement. Should this court strike these community custody conditions when they are not permitted by statute, or are overbroad or do not provide fair warning of proscribed conduct and expose appellant to arbitrary enforcement?

B. STATEMENT OF THE CASE

1. Procedural facts.

The Benton County Prosecutor charged Aristides Guevara with two counts of first degree child rape and one count of first degree child molestation. CP 1–2,[1] 18–20,[2] 26–28.[3] Shortly before trial, the State added two alleged aggravating factors to all counts: that there was a

[1] Original Information.
[2] First Amended Information.
[3] Second Amended Information.

pattern of sexual abuse of the victim, L.A.Z.,[4] and that Mr. Guevara abused a position of trust in committing the offenses.[5]

The jury trial was held June 13–16, 2016. RP 1–577.[6] The jury found Mr. Guevara guilty as charged in the second amended information. CP 26–28, 107, 110, 113; 6/17/16 RP 3–5. The jury found the two aggravating factors as to each count. CP 108–09, 111–12, 114–15; 6/17/16 RP 3–6. The standard range for first degree rape of a child was 162–216 months to life and for first degree child molestation was 98–130 months to life..[7] CP 129. The court followed the State's recommendation and used the aggravating factors to impose an additional 60 months on each count, for a resulting exceptional minimum sentence of 276 months and 190 months, respectively.[8] CP 130; RP 588–93. The court did not

[4] Initials are used in place of the child's name.
[5] See RCW 9.94A.535(3)(g) and (3)(n).
[6] The trial transcripts and sentencing are contained in four volumes and will be cited as "RP ___." The verdict and miscellaneous hearings were transcribed separately and will be referred to by date, e.g., "6/17/16 RP ___."
[7] First degree rape of a child and first degree child molestation are subject to sentencing under RCW 9.94A.712. The court is required to impose a minimum term as well as a maximum term. RCW 9.94A.712(3)(a), (b). The maximum term is the statutory maximum. First degree rape of a child and first degree child molestation are class A felonies with a maximum term of life. RCW 9A.44.073, .083; 9A.20.021(1)(a).
[8] See RCW 9.94A.535, Departure from Guidelines.

enter written findings of fact and conclusions of law to support its exceptional sentence.

Mr. Guevara appeals his convictions and his sentence. CP 150.

2. Trial facts.

Aristides Guevara and Dalia Guevara Zamarripa (hereinafter "mother") have known each other since they lived next door to each other in El Salvador, when the mother was a child. RP 348, 356, 501. Mr. Guevara is the mother's paternal uncle. RP 333. Time passed. In 2002 Mr. Guevara found himself in Kennewick, Washington, and in need of a place to stay. RP 333–34, 348–49, 372, 499. The mother, who was pregnant with their daughter L.A.Z, lived with her husband Jose Zamarripa (hereinafter "father") and their son L.Z. (hereinafter "oldest son" or "brother") in a Kennewick three-bedroom duplex on West Canal Drive. RP 314, 333–34, 499–500. In the back of the house Mr. Guevara stayed in an outside sunroom that they converted into a bedroom. RP 339–40, 438, 460. L.A.Z. was born January 28, 2003. RP 433, 500. A second son was born about three years later. RP 432, 500. Mr. Guevara lived at West Canal Drive with the family for about eleven years. RP 337–38, 364–65, 372, 500–01.

Although Mr. Guevara never provided care for the children, the mother and father trusted him and allowed him to be alone with their children from time to time. RP 340, 342, 348, 365. L.A.H. and the oldest son called Mr. Guevara "Tio," which meant "Uncle." RP 330, 438.

The parents separated in March 2013. RP 334, 348–49. The mother and sons moved in with her parents, who lived in the other side of the duplex. RP 334, 336–37, 349, 359, 460. L.A.Z. chose to stay with her father and Mr. Guevara. RP 334–35, 359, 350–51. Mr. Guevara moved out into an apartment on Olympic Street in May or June 2013. RP 335, 351–52. The divorce was finalized in January 2014. RP 349. The mother and sons moved into a house on 7th Street in March or April 2014. RP 335–36. L.A.Z. joined her mother and brothers in June 2014. RP 336. When the duplex was foreclosed upon in mid-2014, the father stayed at different places until he moved into Mr. Guevara's Olympic Street apartment the fall of 2015. RP 336–37, 339, 258.

L.A.Z. was bilingual and spoke better Spanish than her older brother. Sometimes Mr. Guevara, who speaks very little English, would ask L.A.Z. to come with him to one of his landscaping or gardening jobs or perhaps a store or appointment, in order to translate for him. RP 317, 328, 341, 365, 458, 482, 503–04. This continued with less frequency once

Mr. Guevara moved into his apartment. RP 342, 457–58, 482. Her parents and/or grandparents were aware of and gave permission to Mr. Guevara to have L.A.Z. interpret for him. RP 342, 493.

The final charging period was between "the 28th day of January, 2009, and the 27th day of January, 2015."[9] L.A.Z. turned six years old on January 28, 2009 and began first grade that fall. She turned twelve years old on January 28, 2015, halfway through her sixth grade. RP 434–35, 471.

L.A.Z. generally described the chronology as touching over her clothing, progressing to touching under her clothing, and then to an actual sexual act. She thought the latter started when she was nine years old. RP 440–41. On cross-examination, L.A.Z. said the sexual intercourse acts occurred when she was about "nine – ten'ish," and that she was around nine years old when he would "try to" insert his penis but it was when she was around eleven years old when "it actually went further." RP 479, 487.

L.A.Z. was five years old when she went to kindergarten. RP 471. When four years old, she went to preschool at Westgate and would wait for a bus inside the house at West Canal Street. RP 441, 471, 477. She recalled Mr. Guevara often made her sit on his lap and would kiss her

mouth while touching her breast and vaginal area with his hand, over her clothes. RP 441–43. She recalled him later rubbing her breast or vaginal area under her clothes when he came into her bedroom sometimes at night. RP 443–44. Sometimes he'd take her from her bedroom back to his bedroom and touch her over or under her clothes. RP 445. When he was done, she'd leave immediately. RP 446.

"Later on," Mr. Guevara asked her to touch his penis in his bathroom (RP 446) and another time under water when they went fishing with her Grampa and she could not stand in the current alone. RP 447, 449. One time In his bedroom he'd turned a pornography channel on and made her watch and told her that's what he wanted her to do and then in the bathroom he made her stand on the closed toilet seat lid and rub his penis, and then forced it into her mouth. RP 445, 447–48.

When L.A.Z. got "older," "more than once" he would take her to his bedroom and put his penis inside her. Sometimes his breathing got heavier. RP 449–51. Once he had her bend over and brace herself against the doorframe while he inserted himself from behind, using a condom. RP 451–52, 464–65. The witness guessed that was because she was at risk of becoming pregnant and he'd asked her to tell him when she first began her

---

[9] CP 26–28.

menstrual cycle. RP 452. She had her first menstrual period at age nine. RP 453.

He would also touch L.A.Z. in his apartment, and in his van. RP 453. One time in the van, he put his penis inside her from behind and rubbed her breast underneath her clothes, as she knelt on a laid-down middle seat and used her arms on the headrest to support herself. RP 454–56. Sometimes while driving he'd reach over, outside of her clothes, to touch her breast or try to rub her vaginal area with his penis. RP 456–57.

L.A.Z. helped Mr. Guevara clean his apartment when he first moved in and continued doing some translation for him. RP 457–58. "More than three times" upon returning to the apartment instead of taking her home, Mr. Guevara would take L.A.Z. to his bedroom and make her have sex with him. RP 458–59. "Once or twice" when she lay on the bed he would get on his knees and lick her vaginal area. RP 465. When she tried to push him off he'd use more force by leaning forward. He'd then insert his penis in her. RP 465–66. L.A.Z. estimated she'd been at Mr. Guevara's apartment twelve times and said her parents, grandparents, or someone knew she was going there each time. RP 488–89.

During trial, the State began to examine the complaining witness about the last time Mr. Guevara had touched her, apparently at her

grandparents' house. L.A.Z. thought it was in the sixth grade, perhaps the end of 2014 or beginning of 2015. RP 459–60. Counsel for Mr. Guevara objected and requested a sidebar. RP 461. The following bench conference was recorded:

> MR. SWINBURNSON: She's testified, according to the interview she had, [the event at her grandparent's house took place] past her 12th birthday. So I'm going to object. This is not relevant at all to the charging documents. All the charging documents indicate [the alleged offenses] occurred before the 12th birthday. So all of this is not relevant to the charges brought by the State, so I'm objecting to this.
>
> MS PETRA: Your Honor, this is last disposition[10] evidence. Any evidence of sexual acts before and after the charging period are admissible.
>
> The jury has the context over the entire sexual relationship. So I would submit that any abuse that happened before the charging period is admissible at trial, through the witness. And any sexual abuse that happened after the charging period is admissible.
>
> And I have cases on point. If we need to take a break, I can get that. I can tell you that I'm not going to explore much more than I did, but I feel comfortable that the case law is directly on point on this issue.
>
> MR. SWINBURNSON: The other problem we've got is at least one year -- almost one year of the charging document is beyond the 12-year-old age, based on her testimony.
>
> And so there is a whole year that's contained in the charging document that is beyond her 12th year. So there is a flaw with the charging document that needs to be changed.

[10] It is more likely the prosecutor said, "lustful disposition." *See e.g., State v. Ray,* 116 Wn.2d 531, 547, 806 P.2d 1220 (1991).

MS PETRA: I would be more than happy to change it, but I don't need to change it. And it is true the charging document ends December 15 of 2015, and she turn[ed] 12 [on January 28, 2015][11].

I will, in closing argument, make it very clear to the jury that all the sexual abuse that they have to find has to be less than her 12th birthday.

I will admit that that is a flaw in my charging document and the to convict instructions. I will make that very clear.

But you are correct. There is approximately 11 months where she turns or she is 12. And my charging period is too big. I would be more than happy to amend the Information, if you would like me to do that.

THE COURT: So I am going to overrule the objection because I find that this testimony – that Miss Petra's question goes to the last incident that she recalls happening. I think it's appropriate to give the jury context. It is beyond her 12th birthday.

I think the remedy as far as the error in the charging document that makes it too expansive or too broad is to narrow it. She certainly can do that, if you want that.[12] We can narrow it in the jury instructions, as well.

But the elements are very clear that this child has to be under the age of 12, and so that's Miss Petra's burden of proof and I'm certain she will make that clear in closing.

You can certainly point out in your closing, as well, that it has to be for acts under the age of 12.

MR. SWINBURNSON: Okay.

RP 461–63. The State thereafter continued its direct examination. RP 463 *et seq.*

[11] L.A.Z.'s date of birth is January 28, 2003. RP 433.

[12] A Second Amended Information was filed that same day, June 16, 2016. It amended the ending date of the charging period for each of the three counts to "the 27th day of January, 2015." CP 27–28.

The last time Mr. Guevara touched L.A.Z. was when they walked from her grandparents' side of the duplex to her side. In the hallway leading to her entrance, Mr. Guevara pushed L.A.Z.'s shoulders against the wall and touched her vaginal area over and under her clothing with his hand. RP 460–61, 464. It was just this one day that anything happened at her grandparents' house. RP 484.

> Q: Okay. And do you remember when that was?
>
> A: Umm, I think it was in sixth grade.
>
> Q: Okay. And you remember … you [disclosed the abuse] in December of 2015?
>
> A: Yes.
>
> Q: So when you think about 2015, did he touch you in 2015?
>
> A: Maybe like the ending of 2014, too.
>
> Q: The end of 2014, or the beginning of 2015?
>
> A: Yah.
>
> Q: Okay. So the beginning of 2015, you were – you turned 12 in January?
>
> A: Uh-huh.
>
> Q: Okay. So that was the last time that he touched you?
>
> A: Uh-huh.
>
> Q: And where was that?
>
> A: At my grandparents' house.

RP 459–60.

On cross-examination, defense counsel followed up on when the incident took place.

> Q: … Did anything ever – other than the testimony you gave about the last time, did anything ever happen at your grandparents' place?
>
> A: No.
>
> Q: So just that one time?
>
> A: Well, it happened throughout the day.
>
> Q: Okay. But just that one day, though?
>
> A: Yay.
>
> Q: All right. And that would have been – Your testimony was that was – Well, I think you told Miss Murstig [the forensic child interviewer] that was after you were twelve years old. Correct?
>
> A: Yes.

RP 484–85; 387–88, 395.

In December 2015, when she was almost thirteen years old, L.A.Z. told her church's Spanish Youth Minister about the sexual abuse. RP 297–98, 304–05, 468. She hadn't told her parents about it earlier because Mr. Guevara had threatened that if L.A.Z. told, he would do something to her mother. RP 466–67.

C. ARGUMENT

1. Considering evidentiary matters implicating constitutional rights at an inaudible sidebar constituted a courtroom closure that violated Mr. Guevara's right to a public trial.

A criminal defendant has a right to a public trial under both the United States Constitution and the Washington State Constitution. *State v. Lormor,* 172 Wn.2d 85, 90–91, 257 P.3d 624 (2011); U.S. Const. amend. 6; Const. art. I,§ 22. "The public trial right is found in two sections of the Washington Constitution: article I, section 22, which guarantees a criminal defendant a right to a 'public trial by an impartial jury,' and article I, section 10, which guarantees that '[j]ustice in all cases shall be administered openly.'" *State v. Frawley,* 181 Wn.2d 452, 458–59, 334 P.3d 1022 (2014) (plurality opinion) (alteration in original). The presumption is that all proceedings in a trial are open. *State v. Paumier*, 176 Wn.2d 29, 34–35, 288 P.3d 1126 (2012).

Whether a defendant's public trial right has been violated is a question of law reviewed de novo. *State v. Wise,* 176 Wn.2d 1, 9, 288 P.3d 1113 (2012) (quoting *State v. Easterling,* 157 Wn.2d 167, 173–74, 137 P.3d 825 (2006)). To answer that question, the court engages in a three-part inquiry: "(1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) if so, was the closure justified?" *State v. Smith,* 181 Wn.2d 508, 521, 334 P.3d 1049 (2014) (citing *State v. Sublett,* 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring)).

To determine whether a court proceeding implicates the public trial right, the Court applies the "experience and logic" test. *Sublett*, 176 Wn.2d at 72–75. The "experience prong" asks "'whether the place and process have historically been open to the press and general public.'" *Id.* at 73 (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L. Ed. 2d 1 (1986)). The "logic prong" asks "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (quoting *Press-Enter.*, 478 U.S. at 8). If both questions are answered yes, then the court proceeding implicates the public trial right. *Id.*

a. Experience and logic demonstrate discussion and rulings regarding the proper testimony and extent of examination of the State's key witness should be heard in open court.

Here, in effect and substance, the trial court closed the trial to the public when it addressed and decided the evidence and testimony issues regarding prior sexual misconduct occurring before and after the charging period in an inaudible sidebar. Those rulings helped shape the course of the trial, yet neither the public nor the defendant was privy to them. This was a violation of the defendant's public trial right.

In *State v. Smith*, the Washington Supreme Court held that traditional sidebar conferences do not implicate the public trial right.

Smith, 181 Wn.2d at 511. Proper sidebars deal with mundane issues implicating little public interest. *Smith*, 181 Wn.2d at 516 (citing *Wise*, 176 Wn.2d. at 5). "True sidebars are generally permissible—especially when held in open court. *See Sublett*, 176 Wn.2d at 140 (Stephens, J., concurring) (condoning "brief sidebars to allow counsel to raise concerns that may need to be taken up outside the jury's presence")." *Smith*, 181 Wn.2d at 542 fn 5 (Owens, J., dissenting). Here, the inaudible conference was not a "sidebar" in the traditional sense.

Smith cautioned that "merely characterizing something as a 'sidebar' does not make it so." *Id.* at 516 fn10. The court explained "*[t]o avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly recorded.*" *Id.* (emphasis added). The hallway conference in *Smith* was a "sidebar" because it was the most expedient method for resolving evidentiary objections, given the courtroom's peculiar layout that allowed a jury to hear a traditional sidebar. *State v. Whitlock*, 195 Wn. App. 745, 753, 381 P.3d 1250 (2016) (citing *Smith*, 181 Wn.2d at 515).

In *Whitlock*, the court held, in a two to one decision, that an in-chambers proceeding violated the defendants' right to a public trial. It

reversed the convictions. 195 Wn. App. at 755; see *id.* at 756–62 (Korsmo, J., dissenting).

On appeal, the Washington Supreme Court reaffirmed its adherence to *Smith*. *State v. Whitlock*, *slip op.* at 2 (No. 93685-4, June 15, 2017). The court recognized that "[i]n *State v. Smith*, the court held that the constitutional right to an open courtroom did not require trial courts to invite the public to attend sidebars. It defined '[p]roper sidebars' as those occurring at sidebar or its equivalent and involving 'mundane issues implicating little public interest.' Typical examples of such mundane issues are scheduling, housekeeping, and decorum." *Whitlock*, *slip op.* at 1–2 (citations omitted).

The *Whitlock* court concluded the in-chambers conference at issue was "definitely not a '[p]roper sidebar.'" *Whitlock*, *slip op.* at 13. It occurred in chambers, not at a regular sidebar location. *Id.* The use of a sidebar proceeding to prevent disruption of the flow of trial was unnecessary in a bench trial where the objection "could have been argued on the record at any time with no inconvenience to anyone." *Id.* at 14. Most important, the issue was not mundane or purely technical or legalistic because "the topic of discussion was the proper extent of cross-examination of a confidential informant who was the State's key witness"

and was thus a "matter easily accessible to the public: informants and their motives to curry favor with authority." *Id.* at 2, 14. The court concluded the in-chambers proceeding was not a sidebar, constituted a courtroom closure, and occurred without the justification that might be provided by a *Bone-Club*[13] analysis. It affirmed the Court of Appeals' ruling that the courtroom closure constituted a structural error requiring reversal. *Id.* at 15.

Here, as in *Whitlock,* the inaudible conference was not a regular sidebar. As to the experience prong, there can be no question that issues as to the admissibility of evidence and objections to inquiries by counsel have "historically been open to the press and general public" as they are inherent to the trial process in its search for truth. *See e.g., State v. Martin*, 171 Wn.2d 521, 535–36, 252 P.3d 872 (2011); *Smith*, 181 Wn.2d at 541–44 (Owens, J., dissenting) and cases cited therein.

Logic shows that "public access plays a significant positive role in the functioning of the particular process in question," *i.e.* the trial. The subject of the inaudible sidebar was not mundane.[14] It involved the scope of examination of the complaining child witness regarding Mr. Guevara's

---

[13] *State v. Bone Club,* 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995).
[14] *See e.g., Sublett*, 176 Wn. 2d at40 (scheduling, juror hygiene or trial management); *Smith*, 181 Wn.2d at 538 fn1, 541 fn 4 (Owens, J., dissenting) (discussion of time for recess); and *Whitlock*, *slip op* at 2 (scheduling, housekeeping, and decorum).

alleged prior sexual misconduct occurring before and after the charging period, and the constitutional implications of such evidence and testimony of uncharged allegations. The objection and discussion at the inaudible sidebar was not purely technical or legalistic. It was about a matter easily accessible to the public: an accused is entitled to a fair trial. The public has a strong interest in assessing the significance of alleged uncharged misconduct and whether the defendant has been permitted to challenge the State's evidence fairly.

A judge's decisions should, and must, be made in open court and not secretly in chambers to preserve the integrity of the trial. To do otherwise would undermine a trial's search for truth where the public's access plays a major role in assuring the open and fair process guaranteed by the Constitution. *Sublett*, 176 Wn.2d at 72–73.

b. The trial court impermissibly closed the courtroom without conducting the *Bone-Club* analysis.

The *Smith* court did not decide whether a sidebar constituted a closure. 181 Wn.2d at 520. However, Washington courts recognize that a closure "occurs when the public is excluded from particular proceedings within the courtroom." *State v. Anderson*, 187 Wn. App. 706, 712, 350 P.3d 255 (2015); accord *State v. Leyerle*, 158 Wn. App. 474, 483, 242

P.3d 921 (2010) (holding voir dire conducted in a hallway outside the courtroom was closed to the public). In *Anderson,* the court held a sidebar constituted a closure because its entire purpose was "to prevent anyone other than those present at the sidebar ... from hearing what [was] being said." 187 Wn. App. at 713. This was true even though "the trial court neither barred the public from the courtroom during the sidebar conference nor held the conference in a physically inaccessible location." *Id.*

The subsequently available record of the conference does not absolve the constitutional violation. *Paumier*, 176 Wn.2d at 32–33 (public trial violation even where in-chambers questioning of prospective jurors "was recorded and transcribed by the court"); *Sublett*, 176 Wn.2d at 142 n.3 (Stephens, J. concurring); *Leyerle*, 158 Wn. App. at 484 n.9 ("[T]he mere existence of such recordings, and thus the public's potential ability to access those recordings through determined effort, plays no role in deciding whether a trial court has observed proper courtroom closure procedures.").

Anderson makes sense and controls. The trial court intended to prevent the jury from hearing the evidentiary objection, and as a result, the public was also excluded. This was therefore a courtroom closure. And the trial court did not conduct a *Bone-Club* analysis, so the closure was not

justified. *Smith*, 181 Wn.2d at 520 ('[a] closure unaccompanied by a *Bone-Club* analysis on the record will almost never be considered justified"). *See Frawley,* 181 Wn.2d at 460 ("The articulation of a compelling interest [under the *Bone-Club* analysis] ensures that court proceedings are not closed merely for the sake of convenience as a matter of course." (citing *Presley v. Georgia,* 558 U.S. 209, 215, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010))).

Failure to perform the *Bone-Club* analysis before closing the courtroom is structural error, no matter how brief the closure. *State v. Shearer*, 181 Wn.2d 564, 572-73, 334 P .3d 1078 (20 14). This Court should reverse and remand for a new trial. *Wise*, 176 Wn.2d at 19.

2. Mr. Guevara's multiple overlapping convictions for the same child rape offense at the same time violate double jeopardy.

a. The double jeopardy clause prohibits multiple convictions for the same offense.

The constitutional protection against double jeopardy prohibits multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L.

Ed. 2d 865 (1989); *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011); U.S. Const. amend. 5; Const. art I, § 9.

If a person is convicted of offenses that are identical both in fact and in law, the multiple convictions violate the right to be free from double jeopardy. *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). The double jeopardy clause bars multiple convictions arising out of the same act even if concurrent sentences have been imposed. *State v. Calle*, 125 Wn.2d 769, 775, 888 P.2d 155 (1995).

This prohibition is strictly and rigorously protected by our courts. *Mutch*, 171 Wn.2d at 664. When charges are identical, such as those involving the same offense, same complaining witness, and same time period, courts must pay special attention to ensure no double jeopardy violation occurs. *Id.*

To prevent such multiple convictions from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes each charged offense. *State v. Noltie*, 116 Wn.2d 831, 842–43, 809 P.2d 190 (1991); *State v. Borsheim*, 140 Wn. App. 357, 367, 165 P.3d 417 (2007). "[I]n sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the trial court must instruct the jury 'that they are to find "separate and distinct acts" for each

count.'" *Borsheim*, 140 Wn. App. at 367 (quoting *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996); *Noltie*, 116 Wn.2d at 848–49)).

The court's instructions must clearly inform the jury that each crime requires proof of a different act. *Mutch*, 171 Wn.2d at 663 (citing *Borsheim*, 140 Wn. App. at 367. The jury must be provided "sufficiently distinctive 'to convict' instructions or an instruction that each count must be based on a separate and distinct criminal act." *Id.* at 662 (citing *State v. Carter*, 156 Wn. App. 561, 567, 234 P.3d 275 (2010); *State v. Berg*, 147 Wn. App. 923, 934–35, 198 P.3d 529 (2008)).

Where the jury is not instructed to find each count is a separate and distinct act from all other counts, double jeopardy may be violated. *Mutch*, 171 Wn.2d at 662–63; *Carter*, 156 Wn. App. at 568 (reversing three counts of rape in same charging period due to lack of "separate and distinct" jury finding); *Berg*, 147 Wn. App. at 934–37 (same holding for two counts of rape); *Borsheim*, 140 Wn. App. at 370–71 (same holding for multiple counts of rape of a child in same charging period but only one "to convict" instruction); *State v. Holland*, 77 Wn. App. 420, 425, 891 P.2d 49 (1995) (reversing convictions for two counts of child molestation where it was impossible to conclude that all twelve jurors agreed on same act to support convictions on each count). In the absence of proper jury

instructions, reversal is required unless it was "manifestly apparent" that the conviction for each count was based on a separate act. *Mutch*, 171 Wn.2d at 664. Review is "rigorous" and it will be "a rare circumstance" where the appellate court should affirm despite deficient jury instructions. *Id.* at 664–665.

b. The jury instructions failed to protect against a double jeopardy violation.

The jury instructions here were similar to those courts ruled inadequate in *Mutch*, *Carter*, and *Borsheim*. Mr. Guevara was charged with two counts of the same offense for the same complainant during the same charging periods. CP 27. The jury was not instructed it must find each count rested on a separate and distinct act. CP 78–106 *passim*. Due to the wholly overlapping nature of the charging periods and offenses, the jury may have convicted Mr. Guevara of the two child rape offenses based on a single act in violation of double jeopardy.

Although the jury was instructed to decide each count separately, this instruction does not cure the double jeopardy violation. CP 85. This same instruction was provided to the juries in *Mutch*, *Carter* and *Borsheim*. *Mutch*, 171 Wn.2d at 662–63; *Carter*, 156 Wn. App. at 564–65 & n.4; *Borsheim*, 140 Wn. App. at 364. In each case, the court found this

instruction was inadequate to cure the potential double jeopardy violation because it does not explain the underlying conduct must be different.

The court's instructions included a unanimity instruction, which told the jurors "one particular act" must be proven beyond a reasonable doubt and "you must unanimously agree as to which act has been proved." CP 93.[15] But this instruction does not direct jurors to base each verdict on separate and distinct acts. *Borsheim*, 140 Wn. App. at 366 & n.2. Again, a similar instruction was provided to the juries in *Mutch*, *Carter* and *Borsheim*, but the courts still ruled it inadequate to avoid a double jeopardy violation. *Mutch*, 171 Wn.2d at 663; *Carter*, 156 Wn. App. at 564 & n.3; *Borsheim*, 140 Wn. App. at 364.

The court's instructions failed to include the separate and distinct acts language as required by *Mutch* and advised by the Washington pattern instructions. WPIC 44.21 Note on Use (referencing WPIC 4.25) & Comment; WPIC 4.25 Comment.

---

[15] The court gave the following instruction:

> The State alleges that the defendant committed acts of Rape of a Child in the First Degree on multiple occasions. To convict the defendant on any count of Rape of a Child in the First Degree, one particular act of Rape of a Child in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree.

CP 93, Instruction No. 12.

The to-convict instructions rape of a child in the first degreeinvolved identical charging periods and listed the same elements of each offense. CP 93, 94. Counts one and two contained the identical extended charging period of January 28, 2009 through January 27, 2015. *Id.*

The remaining elements, pertaining to age and venue, were identical. *Id.* These to-convict instructions were comparable to those provided in *Mutch*, *Carter*, and *Borsheim*. *Mutch*, 171 Wn.2d at 662; *Carter,* 156 Wn. App. at 564 & n.2; *Borsheim*, 140 Wn. App. at 364–65. As in those cases, the jury was never instructed that it was required to use separate and distinct acts to convict Mr. Guevara of each offense.

For example, in *Carter*, the complainant testified she was raped 40 to 50 times over a certain time period and Carter was charged with four counts of rape of a child. 156 Wn. App. at 562. The court gave a unanimity instruction but no instruction on the requirement of separate and distinct acts. This Court held that the instructions "exposed Carter to the possibility of multiple convictions for the same criminal act. Thus, we remand with instructions to dismiss three of the four child rape counts." *Id.* at 568.

The same omission occurred in Mr. Guevara's case. No instruction informed the jury that a separate and distinct act must be found for each count of rape despite the identical offense and same charging periods for the two counts. The instructions exposed Mr. Guevara to multiple convictions for the same act.

c. The overlap in the instructions and charges violates double jeopardy and requires reversal of one rape conviction.

In *Mutch*, the Court explained that it strictly requires jurors to predicate their verdicts on separate acts. 171 Wn.2d at 665. Manifestly apparent jury instructions directing verdicts based on separate and distinct acts must be provided. *Id.* If not, it will be only the rare case where the record sufficiently shows the jurors premised their verdicts on separate and distinct acts beyond a reasonable doubt. *Mutch*, 171 Wn.2d at 664–65 & n.6.

This "rare" circumstance occurred in *Mutch* due to the clarity of the specific offenses charged and absence of any challenge to each act's occurrence by the defense. *Id.* at 665. Mutch was accused of five distinct acts of rape during one episode. *Id.* The defense agreed each act occurred but argued the complainant consented. *Id.* This verdict unmistakably reflected five separate and distinct offenses. *Id.*

Unlike *Mutch*, each charge was challenged as having never occurred. The complainant here had a fuzzy memory and gave ambiguous evidence about the timing and details of the allegations. L.A.Z. described acts that happened outside the charging period, or sexual contact that would not meet the requirements of sexual intercourse needed for the charged offenses of rape, further confusing what happened at the critical time. The timing of the events was critical because the charged offenses of rape of a child in the first degree required the complainant to be a certain age. RCW 9A.44.083(1). The jurors had to be convinced that the acts occurred during the charging period and could not rest their verdicts on acts later in time. Further, the charges were two acts of rape and one act of child molestation. As noted in the prosecutor's closing argument, the facts comprising rape and molestation sometimes overlap. The prosecutor told the jurors they should not use the same evidence of rape in deciding whether molestation had occurred but said nothing about how to consider the evidence in deciding the rape allegations. RP 546.

The instructions did not make it manifestly apparent that separate and distinct acts of sexual intercourse had to form the basis of a guilty verdict on each count of rape. The instructions did not require this

determination and the evidence was both hazy and disputed. This is not the "rare circumstance" presented in *Mutch*.

Mr. Guevara's right to be free from double jeopardy was violated. A double jeopardy violation results in the dismissal of any conviction that violates the constitution. See *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007). One of Mr. Guevara's two rape convictions must be reversed and vacated due to the double jeopardy violation. See *Womac*, 160 Wn.2d at 657; *Berg*, 147 Wn. App. at 935.

3. The judge's factual determination that the aggravating factors were substantial and compelling reasons for imposing an exceptional sentence violated Mr. Guevara's right to trial by jury.

The constitutional rights to due process and trial by jury guarantee a jury finding beyond a reasonable doubt for every fact essential to punishment, regardless of whether the fact is labeled an element or a sentencing factor. *Hurst v. Florida*, U.S. , 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016); U.S. Const. amend. 6, 14; Const. art. I, §§ 21, 22. The State must submit to a jury any fact upon which it seeks to increase punishment. *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013); *State v. Dyson*, 189 Wn. App. 215, 225, 360 P.3d 25 (2015).

"A fact can also become an element of the crime because of the consequences of its proof." *State v. Goss*, 186 Wn.2d 372, 378, 378 P.3d 154 (2016). And facts that "increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime," except prior convictions in some circumstances. *Id.*, quoting *inter alia Alleyne*, 133 S.Ct. at 2160.

To impose an exceptional sentence above the standard range, the jury must find the existence of a statutorily authorized aggravating factor beyond a reasonable doubt. RCW 9.94A.535; RCW 9.94A.537.

But the jury's finding is advisory. It does not, in itself, authorize increased punishment. The court is required to additionally "consider[ ] the purposes" of the SRA and find that the aggravating factor constitutes "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535; RCW 9.94A.537(6). For a court to find substantial and compelling reasons justify an exceptional sentence, it must "take into account factors other than those which are necessarily considered in computing the presumptive range for the offense." *State v. Fisher*, 108 Wn.2d 419, 423, 739 P.2d 683 (1987), quoting *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986). This determination rests on reviewing the purposes of the SRA, determining an exceptional sentence is

consistent with its purposes, and assessing the strength of the State's case to decide whether an exceptional sentence is in the interest of justice. See *State v. Hyder*, 159 Wn. App. 234, 263, 244 P.3d 454 (2011).

Courts have labelled the determination that substantial and compelling reasons justify an exceptional sentence as a legal question. See e.g., *State v. Sulieman*, 158 Wn.2d 280, 290–91, 143 P.3d 795 (2006); *State v. Hughes*, 154 Wn.2d 118, 137 P.3d 192 (2005). But this characterization is incorrect. The court's decision weighs factual issues and no legal standard controls. As one observer noted, "trial courts remain free to liberally fashion vague substantial and compelling reasons in an unstructured ad-hoc fashion." Darren Wu, *Exceptional Discretion in Exceptional Criminal Sentences in Washington*, 29 Gonz. L. Rev. 599, 603 (1994). The court subjectively compares the case or its perception of the gravity of the aggravating factors to decide whether to increase punishment beyond the standard range.

In *Hurst,* the Supreme Court ruled that Florida's death penalty procedure violated the Sixth Amendment because the jury's findings of aggravating factors were advisory. 136 S.Ct. at 620–21. The judge retained authority to weigh the jury's recommendation and could impose the death penalty only with its own additional fact-based determination.

Id. at 621-22. Similarly, the court must find substantial and compelling reasons to impose an exceptional sentence, under RCW 9.94A.535 and .537, which constitutes a mandatory fact-based judicial determination in addition to the jury's finding an aggravating factor exists. If the Legislature was merely according discretion to deny an exceptional sentence after the jury finds aggravating circumstances, it would have said so. Instead, the statute requires the judge to additionally determine substantial and compelling reasons that justify the increased sentence, which is at least a mixed question of fact and law. This factual question must be found by a jury because it authorizes increased punishment. *Hurst*, 136 S.Ct. at 622. The lack of jury finding requires reversal of the exceptional sentence. *Alleyne*, 131 S.Ct. at 2164.

4. The exceptional sentence was not validly imposed where the court failed to comply with the statutory mandate that it find substantial and compelling factors justified the imposition of the exceptional sentence.

Alternatively, if finding substantial and compelling factors justify an exceptional sentence does not contain factual questions that must be resolved by the jury, this Court reviews the sufficiency of the sentencing court's reasons for imposing an exceptional sentence. See *Hyder*, 159 Wn. App. at 262–63.

The SRA[16] imposes a mandatory duty on the trial court to enter written findings of fact and conclusions of law whenever it imposes an exceptional sentence in a criminal case. RCW 9.94A.535. Any time a judge imposes an exceptional sentence, it must send these written findings of fact and conclusions of law to the Sentencing Guidelines Commission. CrR 7.2(d). The mandatory duty may not be circumvented. *State v. Friedlund*, 182 Wn.2d 388, 395, 341 P.3d 280 (2015). The failure to enter sufficient mandatory written findings is not cured by reference to an oral ruling. *Hyder*, 159 Wn. App. at 394. "[H]owever comprehensive," a judge's "verbal reasoning" may not "substitute for written findings." *Id.* "[A] trial court's oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *Friedlund*, at 394. Written findings are necessary to provide the finality of a judgment and sentence and to enable a defendant to meaningfully appeal. *Id.* at 394–95.

The written findings enable "the Sentencing Guidelines Commission and the public at large" to readily determine the reasons

[16] Sentencing Reform Act. RCW 9.94A.020.

behind exceptional sentences, which is essential to "the public accountability that the SRA requires." *Id.* at 395.

Here, the court entered the barest of written findings of fact and conclusions of law. It noted "[X] Aggravating factors were [X] found by a jury by special interrogatory" and summarily stated, "The court finds that substantial and compelling reasons exist which justify an exceptional sentence." CP 129. The is no reference to any statute nor other indication that the court applied the correct legal standard.

In *Hyder*, the court's written order identified each aggravating circumstance to be a substantial and compelling reason for justifying an exceptional sentence; said an exceptional sentence "is in the interest of justice and consistent with the purposes" of the SRA; and found this sentence "is appropriate to ensure that punishment is proportionate to the seriousness of the offense." 159 Wn. App. at 263. The appellate court ruled this explanation satisfied the court's obligation. *Id.*

Unlike *Hyder*, the court's findings here say nothing to explain its reasoning. CP 129. They do not discuss the purposes of the SRA. *Id.* They do not state the court considered those purposes. They do not say that an exceptional sentence was appropriately proportionate as required by the SRA. The court merely parroted the bald conclusion that

substantial and compelling reasons existed without explaining what those reasons were. *Id.*

As the Supreme Court emphasized in *Friedlund*, written findings of fact are mandatory because they fulfill the broader purposes of enabling meaningful appellate review and appropriate public oversight. 182 Wn.2d at 394–95. The court's summary findings and conclusions do not adequately support the exceptional sentence. CP 129. Although the judgment and sentence states that "Findings of fact and conclusions of law are attached in Appendix 2.4," there is no "Appendix 2.4" attached to the document or otherwise filed in the superior court file. CP 129. Remand for a new sentencing hearing is required.

5. The exceptional sentence must be reversed due to the insufficiency of the aggravating factors.

a. The State may not enhance a standard range term absent a clear jury verdict premised on allegations charged and proven to the jury.

An accused person's constitutional rights to a jury trial and due process of law require the government to charge and prove to a jury beyond a reasonable doubt any "fact" upon which it seeks to rely to increase punishment above the maximum sentence otherwise available for the charged crime. *Alleyne*, 131 S.Ct. at 2155; *Blakely v. Washington*, 542

U.S. 296, 301–02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 21, 22. This burden of proof extends to facts used to elevate the minimum term of an indeterminate sentence. *Alleyne*, 131 S.Ct. at 2162.

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence that the State must establish to garner a conviction. *Winship*, 397 U.S. at 364. Whether an aggravating factor legally justifies an exceptional sentence is reviewed de novo. *State v. Stubbs*, 170 Wn.2d 117, 124, 240 P.3d 143 (2010). An aggravating factor must be proved as if it were an element of the offense. *State v. Roswell*, 165 Wn.2d 186, 193, 196 P.3d 705 (2008).

b. The jury's verdict may not rest on uncharged allegations.

An accused person is constitutionally entitled to "adequate notice of the nature and cause of the accusations" to prepare a defense. *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012); U.S. Const. amends. 6, 14; Const. art. I, § 22. To "mount an adequate defense" against an aggravating circumstance listed in RCW 9.94A.535(3), the prosecution

must plainly notify the accused of the factual and legal basis of aggravating factors. *Siers*, 174 Wn.2d at 277. The statutory authority to impose an exceptional sentence similarly mandates the State provide advance notice of the "aggravating circumstances upon which the requested sentence will be based." RCW 9.94A.537(1).

The court is authorized to impose an increased sentence only for the aggravating circumstance that has been properly charged and for which the jury has been instructed. *State v. Williams-Walker*, 167 Wn.2d 887, 895–96, 225 P.3d 913 (2010); Const. art. I, §§ 21, 22. The right to trial by jury means the jury must decide the specific factual issue used to authorize a sentencing enhancement. *Williams-Walker*, 167 Wn.2d at 898.

A person "cannot be tried for an uncharged offense" and the defendant must be informed of "the manner of committing an offense" in the information. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

c. <u>The jury was permitted to convict Mr. Guevara of aggravating circumstances based on uncharged allegations outside the charging period</u>.

The State notified Mr. Guevara it would seek additional punishment based on two aggravating factors: that multiple incidents

against the same victim occurred over a prolonged period of time, and he abused a position of trust. CP 26–28.

The charging document limited these alleged multiple incidents to the charging period. *Id.* It did not indicate the State would rely on allegations outside the charging period. *Id.*

For counts 1 and 2 (first degree child rape) and count 3 (first degree child molestation), the charging document alleged that an offense occurred "during the time intervening between the 28th day of January, 2009, and the 27th day of January, 2015." CP 27–28. After setting forth the factual and legal elements of the charged offenses, the document stated, AGGRAVATING CIRCUMSTANCE ALLEGATION – PATTERN OF SEXUAL ABUSE," citing the aggravating factor. *Id.*. It further stated, AGGRAVATING CIRCUMSTANCE ALLEGATION – POSITION OF TRUST, citing the aggravating factor. *Id.*

Nowhere in the charging document did the State allege that the offenses occurred at another point in time. Yet the jury was not instructed it must base its verdict on conduct alleged to have occurred within the charging period. CP 101–03 (Instructions 18, 19, 20). The jury was told that if they found Mr. Guevara guilty of any count, "you must determine if any of the following aggravating circumstances exists." *Id.* None of the

listed aggravating circumstances mentioned anything about the time period when these circumstances occurred.

The instruction for the first aggravating circumstance alleged that the crime was "part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time." *Id.* This instruction invited the jury to consider allegations from a far broader time period than the six years in the charging periods. See CP 27–28.

For the second aggravating circumstance, the instruction merely asked whether "the defendant used his or her position of trust to facilitate the commission of the crime," without specifying a time period. CP 101–03.

Due to the state's introduction of evidence so the jury would "get to know about the entire sexual content of their relationship," the jury heard allegations of behavior before and after the stated charging period. The State characterized Mr. Guevara's behavior as a "progression" of sexual abuse far beyond the charging period. RP 543, 556, 574.

The jury was instructed only on the general legal definitions of the aggravating factors. CP 101–03. The special verdict forms similarly did not limit the jurors to the charging period. CP 108–09, 111–12, 114–15.

As explained in *Williams-Walker*, the jury's verdict must reflect unanimous findings of the charged sentencing enhancement. 167 Wn.2d at 898. Uncharged allegations may not be the basis of a conviction or sentencing enhancement. *State v. Severns*, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (where "information charged that the crime was committed in a particular way," error to let jury consider other ways); *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (error for court to impose firearm enhancement where only deadly weapon mentioned in charging document, despite trial evidence of firearm).

Here, the information charged the aggravating factors were committed as part of the charged period alleged. The jury's verdict was not limited to the charging period for any aggravating factors. Accordingly, the jury's verdict does not reflect unanimous findings that the aggravating factors occurred within the charged period and does not authorize the court to impose an exceptional sentence.

6. Unduly vague or overbroad or impermissible community custody conditions must be stricken.

Pre-enforcement challenges to community custody conditions are ripe for review "' if the issues raised are primarily legal, do not require further factual development, and the challenged action is final."' *State v. Bahl,* 164 Wn.2d 739, 751, 193 P.3d 678 (2008) (quoting *First United Methodist Church v. Hr 'g Exam 'r for Seattle Landmarks Pres. Bd.,* 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). The court must also consider "' the hardship to the parties of withholding court consideration."' *Id.* at 255.

All of the circumstances of ripeness are present with respect to these final sentencing conditions, which will limit Mr. Guevara as soon as he is released from custody and that he challenges as not crime-related: a pure issue of law. See *State v. Sanchez Valencia,* 169 Wn.2d 782, 788, 239 P.3d 1059 (2010). The fact that Mr. Guevara will have to alter his behavior to avoid a penalty under potentially illegal regulations, or expose himself to arrest or prosecution to challenge them, presents hardship. See *Bahl,* 164 Wn.2d at 747.

a. Community custody conditions must be both constitutionally legitimate and authorized by statute.

Mr. Guevara was ordered to comply with several unauthorized and unlawful conditions of community custody. Community custody conditions must be authorized by statute or crime-related . RCW 9.94A.505(8); RCW 9.94A.703; see *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed *de novo*. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Sentencing conditions are reviewed for abuse of discretion. See *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

In addition, fundamental constitutional rights during community custody may be limited only if "reasonably necessary to accomplish the essential needs of the state and the public order." *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *abrogated by State v. Sanchez Valencia,* 169 Wn.2d 782, 239 P.3d 1059 (2010). A community custody

condition must be sufficiently definite so ordinary people to understand what conduct is illegal and it must have ascertainable standards to protect against arbitrary enforcement. U.S. Const. amend. 14; Const. art. I, § 3; *Bahl*, 164 Wn.2d at 752–53. Erroneous sentences may be challenged for the first time on appeal. *Id.* at 744–45.

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. *Bahl*, 164 Wn.2d at 751–52. The challenge is also ripe because it is purely legal, i.e., whether the condition violates due process vagueness standards. *Id.* at 752.

b. The condition prohibiting use or possession of pornographic materials is unconstitutionally vague and must be stricken.

Offenders on community custody retain a constitutional right to free expression. See *Procunier v. Martinez*, 416 U.S. 396, 408–09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail). A general restriction on accessing or possessing pornographic materials implicates First Amendment rights and is unconstitutionally vague. *Bahl,* 164 Wn.2d at 757–58. Any limitations on the right need to be reasonably necessary to

accomplish the needs of the State. *Id.* And the vagueness problem becomes more apparent when the condition does not provide any ascertainable standards for enforcement. *Id.* at 758.

The community custody condition orders that Mr. Guevara "[s]hall not use or possess any pornographic materials, to include magazines, internet sites, and videos." CP 126. Adult pornography is constitutionally protected speech. *Bahl*, 164 Wn.2d at 757. The term "pornography" is unconstitutionally vague. *Id.* at 757–58; *State v. Sansone*, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005). The offending condition must be stricken.

c. The condition to submit to polygraph testing upon request is overbroad and must be rewritten to specify a more narrow application.

The court erred in imposing the community custody condition requiring Mr. Guevara to "submit to polygraphs and/or plethysmograph testing upon the request of [his] therapist and/or supervising Community Corrections Officer, at your own expense[,]" because the condition as to polygraph testing is overbroad. CP 126. In *Riles*, our Supreme Court upheld an identical condition, but stated that polygraph testing is authorized only "to monitor compliance with other conditions of community [custody]." 135 Wn.2d at 351–52. In the court of appeals, the

court had viewed such a limitation as implicit. *State v. Riles,* 86 Wn. App. 10, 16–17, 936 P.2d 11 (1997), *aff'd,* 135 Wn.2d 326, 957 P.2d 655 (1998).

In a later case, this court found that a community custody condition authorizing polygraph testing should contain language setting forth the "'monitoring compliance'" limitation. *State v. Combs,* 102 Wn. App. 949, 953, 10 P.3d 1101 (2000). It explained that requiring such language "will serve to better inform offenders of their rights, ensure protection of those rights, and prevent confusion amongst judges, defendants and community corrections officers regarding the applicable legal standard." *Id.*

The "monitoring compliance" language is appropriate. See *Riles*, 135 Wn.2d at 351–52. To avoid over broadness, this court should direct the trial court to add the limiting language to the condition.

> d. <u>The condition to avoid places where children congregate is unconstitutionally vague and not crime-related, and must be stricken.</u>
>
> The community custody condition orders Mr. Guevara to
>
> [a]void places where children congregate, including parks, libraries, playgrounds, schools, daycare centers and video arcades.

CP 126. A community custody condition is unduly vague if it does not provide ordinary people with fair warning of the proscribed conduct, or lacks standards that are definite enough to protect against arbitrary

enforcement. *State v. Magana*, 197 Wn. App. 189, 200, 389 P.3d 654 (2016).

In *Magana*, a similar community custody condition was found unconstitutionally vague. The condition ordered the defendant to "not frequent parks, schools, malls, family missions or establishments where children are known to congregate or other areas as defined by supervising CCO [community corrections officer], treatment providers." *Magana*, 197 Wn. App. at 200. Citing to *State v. Irwin,* 191 Wn. App. 644, 654–55, 364 P.3d 830 (2015), the court noted "a community custody condition that empowers a CCO to designate prohibited spaces is constitutionally impermissible because it is susceptible to arbitrary enforcement … While the condition lists several prohibited locations and explains that the list covers places where children are known to congregate, the CCO's designation authority is not tied to either the list or the explanatory statement." *Magana*, 197 Wn. App. at 201. The court concluded the discretion conferred on the CCO by the condition was "boundless," and struck the condition as vague. *Id.*

The condition here is even more unclear. The condition lists several prohibited places that are commonly open to people of all ages, such as parks and libraries. The explanation that the list covers places

"where children congregate" is much broader than "where children are known to congregate," and thus the prohibition requires a CCO and an offender to gauge his avoidance of any area based on a real-time assessment whether children are in fact present. While the condition does not explicitly confer discretion on the CCO to define the areas to be avoided, it is indisputable that alleged violations of a community custody condition are first determined by the CCO.

This condition does not give ordinary people sufficient notice to understand what conduct is proscribed. *Irwin*, 191 Wn. App. at 655. It confers "boundless" authority on the CCO to designate prohibited locations. *Magana*, 197 Wn. App. at 201. And even if its vagueness might be remedied by the CCO's subsequent definition of restricted areas, the condition remains "vulnerable to arbitrary enforcement." *Irwin*, 191 Wn. App. at 655. This condition should be stricken as void for vagueness, as *Irwin* and *Magana* dictate.

The Sentencing Reform Act of 1981, chapter 9.94A RCW, allows trial courts to impose crime-related prohibitions during the course of community custody. RCW 9.94A.505(8), .703 (3)(f). There was no evidence Mr. Guevara met his victim at these prohibited places or that the prohibited places are directly related to the circumstances of his offense.

For the additional reason the prohibition is not crime-related, the condition should be stricken from the judgment and sentence.

7. Appeal costs should not be awarded.

In determining whether costs should be awarded in the trial court our Supreme Court has held:

> The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors such as an individual's other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual's age, family, education, employment history, criminal history, and the

length of the current sentence in determining whether a defendant "cannot contribute anything toward the costs of appellate review." *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that "the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., 'increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.' " *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

Mr. Guevara was fifty-four years old[17] at the time of sentencing and the court imposed a minimum term of twenty-three years in prison. CP 130. The court also found he was indigent for purposes of this appeal. CP 151; RP 592.

In light of Mr. Guevara's indigent status, and the presumption under RAP 15.2(f), that he remains indigent "throughout the review" unless the appellate court finds his financial condition has improved "to

[17] Mr. Guevara's date of birth is April 15, 1962. CP 127.

the extent [he] is no longer indigent,"[18] this court should exercise its discretion to waive appellate costs.[19] RCW 10.73.160(1).

D. CONCLUSION

Mr. Guevara's convictions and sentence should be reversed based on a public trial violation, evidentiary errors, double jeopardy violations, and sentencing flaws, and should be remanded for further proceedings. Alternatively, should the State be deemed the substantially prevailing party, this court should exercise its discretion to waive appellate costs.

Respectfully submitted on June 26, 2017.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office, P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

[18] *Accord,* RAP 14.2, which provides in pertinent part:

> When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances **have significantly improved since the last determination of indigency.** (Emphasis added).

[19] Appellate counsel anticipates filing a report as to Mr. Guevara's' continued indigency no later than 60 days following the filing of this brief.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 26, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Aristides Guevara (#391757)
Coyote Ridge Corrections Center
P. O. Box 769
Connell WA 99326-0769

E-mail: prosecuting@co.benton.wa.us
Andrew Kelvin Miller
Benton County Pros Office

s/Susan Marie Gasch, WSBA #16485

GASCH LAW OFFICE

June 26, 2017 - 3:28 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34636-6
Appellate Court Case Title:	State of Washington v. Aristides Guevara
Superior Court Case Number:	16-1-00085-5

The following documents have been uploaded:

- 346366_Briefs_Plus_20170626152450D3599270_2815.pdf
  This File Contains:
  Affidavit/Declaration - Service
  Briefs - Appellants
  The Original File Name was brief of appellant 2017 06 26 Guevara Aristides 346366.pdf

A copy of the uploaded files will be sent to:

- andy.miller@co.benton.wa.us
- prosecuting@co.benton.wa.us

Comments:

Sender Name: Susan Gasch - Email: gaschlaw@msn.com
Address:
PO BOX 30339
SPOKANE, WA, 99223-3005
Phone: 509-443-9149

Note: The Filing Id is 20170626152450D3599270